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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KEITH ALLEN STEVENSON, Defendant and Appellant.	A121825 (Contra Costa County Super. Ct. No. 071816-3)

Keith Allen Stevenson appeals from a conviction of residential burglary. He contends the trial court erred in denying his objection to the prosecutor's peremptory challenges of three Latino prospective jurors. We affirm.

STATEMENT OF THE CASE[1]

Appellant was charged by information filed on November 28, 2007, with residential burglary. (Pen. Code, § 459, 460, subd. (a).) It was alleged that he was ineligible for probation due to two prior burglary convictions. (§1203, subd. (e)(4).) Appellant was convicted as charged after a jury trial and sentenced to a four-year prison term. He filed a timely notice of appeal on June 6, 2008.

DISCUSSION

Appellant argues his conviction must be reversed because the prosecutor exercised her peremptory challenges in a discriminatory manner to remove Latino prospective

[1] Recitation of the facts underlying the offense is unnecessary to resolution of the issue on appeal.

jurors and the trial court failed to sufficiently consider the prosecutor's justifications for the challenges. Appellant is Caucasian and the record does not reflect the racial composition of the jury that was empanelled.

Defense counsel raised a *Batson/Wheeler*[2] challenge after the prosecutor's peremptory challenge of Mr. V., stating that this was "apparently the third person who, to me, appeared to be Latino" and that she had not heard anything different from these prospective jurors than from the others. The three challenged prospective jurors were Mr. V., Ms. D. and Mr. L. The trial court stated there "appears to be a pattern here" and found a prima facie case.

In response, the prosecutor pointed out that, based on last name or physical appearance, there appeared to be at least 12 people of Hispanic or Latino descent in the entire venire, and in the current panel of 12, one Hispanic female, Ms. C., was still seated, as was one man who appeared to be Asian but whose last name might indicate Latino descent, Juror 3. The prosecutor said she excused Mr. L. because he was single and noted that she had also excused two women because they were single and there was only one remaining juror who was single. The prosecutor explained her additional reasons as follows: "He also was unemployed which is a reason that is common for us to kick individuals. It tends to be an indication that they do not work with the other twelve people in the panel. They're not productive members of society. He also does not have children, indicating that he is not a contributing member of society. He's from the San Pablo area which is a lower class area within our county."

With respect to Mr. V., the prosecutor stated, "he is an individual who is wholly retired from the military from a disability. He is not a member who, therefore, worked in the general community, only from the military. He also – the biggest reason why he was kicked by me was because he says he has a religion for which he cannot make a decision. And when he was further asked by the Court, he said he could make a decision.

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[2] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

However, clearly we wouldn't want him getting back into the jury room and not being able to deliberate."

Regarding Ms. D., the prosecutor explained that she "is an early childhood program teacher for the University of Berkeley. It is sociology type background, common liberal type background, and is not the type of individual which is better for the prosecution. That's also supported by the fact she's only been in Martinez for four years. Her prior areas were San Francisco, which is a liberal framework, and Ventura County. And being from Fresno, I'm aware that Ventura County is also a liberal area."

Defense counsel responded that both Ms. D. and Mr. V. were married; there were other single jurors in the current panel; the prosecutor's questioning of the three Hispanic or Latino jurors she removed was limited; Ms. D. was not asked about her work and "whether that would affect her"; Mr. L. said he had been working until two months before and had also had a former job; Mr. V. said he could set aside his religion and make a decision on the case; and a number of people the prosecutor had not excused also "said something or other to come to a decision on the case."

The court denied the motion, finding that the prosecutor's reasons were neutral and the challenges were not designed to eliminate a cognizable group.

The three steps required for a *Batson/Wheeler* claim are well established. "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613 (*Lenix*); *Johnson v. California* (2005) 545 U.S. 162, 168.)

"[T]he rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in

light of all evidence with a bearing on it." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 251-252.) "A prosecutor asked to explain his conduct must provide a ' "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' (*Batson, supra*, 476 U.S. at p. 98, fn. 20.) 'The justification need not support a challenge for *cause*, and even a "trivial" reason, if genuine and neutral, will suffice.' (*People v. Arias* (1996) 13 Cal.4th 92, 136, italics added.) A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. (See *People v. Turner* (1994) 8 Cal.4th 137, 165; *Wheeler, supra*, 22 Cal.3d at p. 275.) Nevertheless, although a prosecutor may rely on any number of bases to select jurors, a legitimate reason is one that does not deny equal protection. (*Purkett v. Elem* (1995) 514 U.S. 765, 769.) Certainly a challenge based on racial prejudice would not be supported by a legitimate reason.

"At the third stage of the *Wheeler/Batson* inquiry, 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' " ([*Miller-El v. Cockrell* (2003) 537 U.S. 322] at p. 339.) In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. (See *Wheeler, supra*, 22 Cal.3d at p. 281.)

"Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. (*People v. Bonilla* [(2007)] 41 Cal.4th [313,] 341–342.) 'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges " 'with great restraint.' " [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court

makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' (*People v. Burgener* (2003) 29 Cal.4th 833, 864.)" (*Lenix, supra,* 44 Cal.4th at pp. 613-614, footnote omitted.)

Appellant contends the present case should be reviewed de novo, rather than with deference, because "the trial court did not conduct a complete and thorough analysis of all of these factors," apparently referring to the factors analyzed in *Miller-El v. Cockrell, supra,* 537 U.S. 322. [3] The cases he relies upon for this proposition do not support him.

People v. Bonilla, supra, 41 Cal.4th 313, 341, declined to apply the usual rule of deference to the trial court in reviewing a trial court's denial of a *Batson/Wheeler* because the United States Supreme Court had "recently concluded that California courts had been applying too rigorous a standard in deciding whether defendants had made out a prima facie case of discrimination. (See *Johnson v. California, supra,* 545 U.S. at pp. 166–168 [holding the requirement a defendant show a 'strong likelihood,' rather than a 'reasonable inference,' of discrimination was inconsistent with *Batson* and the federal Constitution].) In cases where the trial court found no prima facie case had been established, but whether it applied the correct 'reasonable inference' standard rather than the 'strong likelihood'

[3] *Miller-El v. Cockrell, supra,* 537 U.S. 322, 331-335, 342-346, and the subsequent opinion in the same case in *Miller-El v. Dretke, supra,* 545 U.S. 231, 240-267, discussed a number of factors that combined to establish proof of discrimination: The prosecution used peremptory challenges to remove 91 percent of the qualified black prospective jurors; reasons given for these challenges applied as well to non-black jurors kept on the panel; the prosecution employed disparate questioning techniques, framing questions to black prospective jurors to elicit responses reflecting opposition to the death penalty or unwillingness to impose a minimum sentence; the prosecution used a state practice of shuffling the positions of prospective jurors in the venire in a manner suggesting discriminatory intent; and there was evidence that the District Attorney's office for many years had followed a systematic policy of excluding minorities from juries. *Miller-El* was an "egregious" case. (*Lenix, supra,* 44 Cal.4th at p. 626.) Appellant makes no suggestion, and offers no evidence, that disparate questioning, historical discrimination or manipulation of the venire occurred here. His claim is based on statistical evidence and comparative analysis.

standard is unclear, 'we review the record independently to "apply the high court's standard and resolve the *legal* question whether the record supports an inference that the prosecutor excused a juror" on a prohibited discriminatory basis.' " (*People v. Bonilla, supra,* 41 Cal.4th at p. 342.) This rationale has no bearing on the present case.

Lenix, the other case appellant cites, affirms the deferential standard by which we review trial courts' rulings on this kind of motion. At the pages appellant cites, *Lenix* discusses the need for an adequate record for review of a claim based on comparative juror analysis, discussing both the prosecutor's responsibility to offer complete explanations and the trial court's responsibility to allow sufficient time for voir dire. (*Lenix, supra,* 44 Cal.4th at pp. 624-625.) Regarding the trial court's duty, *Lenix* explains, "it is the *trial court's* duty to 'assess the plausibility' of the prosecutor's proffered reasons for striking a potential juror 'in light of all evidence with a bearing on it.' (*Miller-El* [*v. Dretke*], *supra,* 545 U.S. at p. 252.) The *Snyder* [*v. Louisiana* (2008) 552 U.S. 472, 128 S.Ct. 1203 (*Snyder*)] court stated that the trial court bears a 'pivotal role in evaluating *Batson* claims,' for the trial court must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge. (*Snyder, supra,* 552 U.S. at p. ___ [128 S.Ct. at p. 1208].)

"It should be discernable from the record that (1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race neutral; (2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and (3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges. As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it

heard and the overall behavior of the panelist. The record must reflect the trial court's determination on this point (see *Snyder, supra,* 552 U.S. at p. ___ [128 S.Ct. at p. 1209]), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (*Lenix, supra*, 44 Cal.4th at pp. 625-626.)

This last point is significant. As appellant asserts, the trial court has a duty *not* to take a prosecutor's reasons at face value but rather to actually determine their credibility. But the trial court is not required to expressly elaborate the reason for its overall conclusion that the prosecutor's reasons were credible. "In determining whether the defendant ultimately has carried his burden of proving purposeful racial discrimination, 'the trial court "must make 'a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily … .' [Citation.]" ' (*People v. Reynoso* (2003) 31 Cal.4th 903, 919.) '[T]he trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine.' (*Ibid.*) Inquiry by the trial court is not even required. (*Id*. at p. 920.) 'All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory.' (*Id*. at p. 924.) A reason that makes no sense is nonetheless 'sincere and legitimate' as long as it does not deny equal protection. (*Ibid*.)" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1100-1101.)

For example, the trial court in *Lenix* stated, " 'Based on the representations that I have from [the prosecutor] … I do not find those challenges to be motivated because of the fact that any of the jurors excused were members of a minority group but rather for other reasons not motivated by any kind of ethnicity or membership in any particular minority group, so I'm going to deny the *Wheeler* motion.' " (*Lenix, supra,* 44 Cal.4th at

p. 611.) *Lenix* rejected the defendant's argument that a deferential standard of review should not be applied because the trial court made no specific factual findings: "On the contrary, the trial court credited the prosecutor's reasons for excluding C.A. and the three Hispanic panelists, finding those explanations, rather than race, were the motivation for the prosecutor's peremptory challenges." (*Id.* at p. 614, fn. 9.) Here, appellant contends the trial court failed to discharge its duty to thoroughly analyze all the relevant factors and, therefore, its decision should be reviewed de novo. His argument, however, amounts to no more than disagreement with the court's acceptance of the prosecutor's reasons.

Lenix is instructive on the deferential standard we apply to review of *Batson/Wheeler* rulings and the reason deference is necessary. "It is the trial court which is best able to place jurors' answers in context and draw meaning from all circumstances, including matters not discernable from the cold record. As we emphasized in *People v. Johnson* [(2003)] 30 Cal.4th 1302: ' "[T]he trial judge's unique perspective of voir dire enables the judge to have first-hand knowledge and observation of critical events. [Citation.] The trial judge personally witnesses the totality of circumstances that comprises the " 'factual inquiry,' " including the jurors' demeanor and tone of voice as they answer questions and counsel's demeanor and tone of voice in posing the questions. [Citation.] The trial judge is able to observe a juror's attention span, alertness, and interest in the proceedings and thus will have a sense of whether the prosecutor's challenge can be readily explained by a legitimate reason. . . . [¶] The appellate court, on the other hand, must judge the existence of a prima facie case from a cold record. An appellate court can read a transcript of the voir dire, but it is not privy to the unspoken atmosphere of the trial court—the nuance, demeanor, body language, expression and gestures of the various players. [Citation.]" ' (*Id.* at pp. 1320–1321, quoting *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677, 683–684.)

"Under our deferential standard, we consider whether substantial evidence supports the trial court's conclusions. (*People v. Bonilla, supra*, 41 Cal.4th at pp. 341–

342.) Evidence is substantial if it is reasonable, credible and of solid value. (*People v. Abilez* (2007) 41 Cal.4th 472, 504; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Comparative juror analysis is a form of circumstantial evidence. (See *Miller-El* [*v. Dretke*], *supra*, 545 U.S. at p. 241.) The law has long recognized that particular care must be taken when relying on circumstantial evidence. For example, jurors in criminal cases are instructed that before they can rely on circumstantial evidence to find a defendant guilty, they 'must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence.' (Judicial Council of Cal. Crim. Jury Instns. (2006) CALCRIM No. 224.) This principle has been part of our jurisprudence since at least 1945. (See *People v. Bender* (1945) 27 Cal.2d 164, 174–176, overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110.)

"The rationale behind the rule is that, unlike direct evidence, circumstantial evidence does not directly prove the fact in question. Instead, circumstantial evidence may support a logical conclusion that the disputed fact is true. But information may often be open to more than one reasonable deduction. Thus, care must be taken not to accept one reasonable interpretation to the exclusion of other reasonable ones. With regard to an appellate court's review of circumstantial evidence, we have observed: ' " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' (*People v. Bean* (1988) 46 Cal.3d 919, 933.) This same principle of appellate restraint applies in reviewing the circumstantial evidence supporting the trial court's factual findings in a *Wheeler/Batson* holding." (*Lenix*, *supra*, 44 Cal.4th at pp. 626-628.)

Appellant argues that statistics demonstrate the prosecutor's discriminatory purpose in dismissing Latino jurors and that the prosecutor's "rationalizations" lack both

support in the record and logic. On the first point, appellant urges that of the seven peremptories the prosecutor exercised, three – 43 percent – were used to remove Latino jurors, while the Latino population in Contra Costa County in 2008, according to data from the United States Census Bureau, was 22 percent. (http://quickfacts.census.gov/qfd/states/06/06013.html.) Appellant does not explain how the county population provides an appropriate reference point for *Batson/Wheeler* analysis. While cases have considered as a relevant factor a comparison of the percentage of peremptories used against a particular group with the percentage of members of that group in the venire as a whole (*People v. Bell* (2007) 40 Cal.4th 582, 598, fn. 4 ["A more complete analysis of disproportionality compares the proportion of a party's peremptory challenges used against a group to the group's proportion in the pool of jurors subject to peremptory challenge."]; *People v. Bonilla, supra,* 41 Cal.4th at pp. 345-346 [defendant argued prosecution used 67 percent of its peremptory challenges on women when women comprised 38 percent of venire]), appellant has not pointed to any evidence of the racial composition of the venire in this case. Nor has he demonstrated the racial composition of the empanelled jury, which is a factor to be considered in evaluating a *Batson/Wheeler* claim. (See *People v. Bonilla, supra,* 41 Cal.4th at p. 346.) Appellant asserts that the prosecutor removed 75 percent of the Latino prospective jurors from the jury, but he does not explain how he arrives at this percentage.

The main focus of appellant's claim is that the prosecutor's reasons were so lacking in support or logic that they must be viewed as pretextual. "The prosecution's proffer of [a] pretextual explanation naturally gives rise to an inference of discriminatory intent." (*Snyder, supra,* 128 U.S. at p. 1212; *Ali v. Hickman* (9th Cir. 2009) 571 F.3d 902, 920.)

As described above, the prosecutor explained that she excused Mr. L. because he was single, unemployed, unmarried and lived in "a lower class area."

Appellant argues that while the prosecutor claimed to have excused two other jurors because they were single, one of these two was in fact excused by the defense. Appellant's assertion is not borne out by the record: The prosecutor initially said she had excused Ms. B.D. and Ms. S. because they were single; defense counsel interjected that the defense that had excused Ms. S.; and the prosecutor clarified that she meant Ms. M.D. was the second juror she had excused for this reason. As the prosecutor pointed out to the trial court, only one unmarried juror remained on the panel at the time the motion was made. Appellant implies that this juror, Number 18, would have been a more obvious choice for the prosecutor to remove because his nephew had been prosecuted by the Contra Costa District Attorney's office. But the court questioned Juror 18 on this point and Juror 18 stated the prosecution was about 12 years before, it did not leave him with "any kind of feeling toward the criminal justice system," he was not angry at the prosecution, he did not think this was going to make him sympathetic to appellant and he thought he would be able to be fair and impartial. Additionally, Juror 18 had been on juries in criminal cases twice before, albeit once as an alternate, and both had reached verdicts. Appellant's comparison between this juror and Mr. L. is not sufficient to raise an inference of discriminatory intent.

Regarding appellant's unemployment as a reason for the prosecutor's challenge, appellant notes that Juror 15 was unemployed but left on the panel. In citing appellant's unemployment as a reason for her peremptory challenge, the prosecutor explained that unemployment was a common reason for the prosecution to excuse jurors as it "tends to be an indication that they do not work with the other twelve people in the panel. They're not productive members of society." The value judgment reflected in this explanation is unfortunate, as unemployment may be due to circumstances beyond an individual's control; Mr. L. was not asked about the reasons for his unemployment and had only been unemployed for two months. The prosecutor's concern with prospective jurors' ability to work with other jurors on the panel, however, was reflected in her questioning of a number of jurors about working with other people at their jobs. Appellant states that his

experience in sales "would support the inference that he did in fact work well with the public or surely he would not have remained employed for any stretch of time." Mr. L.'s most recent job was as a shoe salesman, for "over a year" and he had worked selling shoes at a different store before that, but was not asked the duration of that job. It would not appear unreasonable to infer from this a less stable work history than that of Juror 15, who was unemployed after working for a credit union for three years and a savings and loan for "twenty-plus" years before that. Additionally, Juror 15 had relatives and close friends in law enforcement, which may have led the prosecutor to view him as a more desirable juror. The record does not support an inference that the prosecutor's reliance on appellant's unemployment was pretextual.

The prosecutor also pointed to the fact that Mr. L. did not have children as an explanation for challenging him. Again, the value judgment reflected in the prosecutor's explanation – that childless individuals are not "contributing member[s] of society" – is not commendable. But the explanation is not race-related. As our Supreme Court explained in the context of a prosecutor's challenge of a juror based on age: "We need not examine the objective reasonableness of the prosecutor's stated basis for the challenge of S.B., namely his desire to exclude younger jurors. The proper focus of a *Batson/Wheeler* inquiry is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons. (See *People v. Reynoso, supra*, 31 Cal.4th at p. 917, citing *Purkett v. Elem, supra,* 514 U.S. 765, 769 [the prosecutor's reason for thinking a prospective juror would not make a good juror in the case—that the prospective juror had long, unkempt hair, a mustache, and a beard—constituted a valid nondiscriminatory reason for exercising the challenge].) What matters is that the prosecutor's reason for exercising the peremptory challenge is legitimate. A ' "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. [Citations.]' (514 U.S. at p. 769.)" (*People v. Hamilton* (2009) 45 Cal.4th 863, 903-904.) There is no basis in the record for us to overturn the trial court's acceptance of the prosecutor's explanation. While appellant attempts to cast the

prosecutor's focus on Mr. L.'s childlessness as pretextual by arguing that four jurors kept on the panel also did not have children, his argument does not consider any other factors relating to these four jurors.[4] As respondent points out, only one of the four, Juror 18, was also single, which we have seen was a factor the prosecutor considered significant.

We reach the same conclusion with respect to the prosecutor's last reason for excusing Mr. L., the fact that he lived in a lower class area. Appellant argues that this fact was irrelevant to the issues in the case. He does not make any showing, however, that the prosecutor treated Mr. L. differently than other jurors so as to suggest the location of his residence was being offered as a pretext. The trial court, with an ability to evaluate the prosecutor's credibility that we do not have, found appellant had not met his burden of proving Mr. L. was excused for discriminatory reasons.

The prosecutor offered two reasons for her exercise of a peremptory challenge to remove Mr. V. She first noted that Mr. V. was "wholly retired from the military from a disability" and had worked only in the military, not in the "general community." Appellant argues that the record reveals Mr. V. worked as a mechanic at the airport and that "[m]ost residents consider the airport part of the general community," presumably to suggest the record does not support the prosecutor's stated reason. The record reference appellant provides is to the questions asked at voir dire on this point, which consist entirely of the court asking Mr. V. what he did at the "airport" before he retired and Mr. V. replying, "Airport mechanic." Mr. V.'s questionnaire lists as his occupation, "USAF Ret." Under "Military Service," Mr. V. wrote "USAF" for "Branch" and "Aircraft Mechanics" for "Specialty." Taken together, nothing in Mr. V.'s statements about his occupation suggests he worked at a civilian airport.

Moreover, the prosecutor stated that her "biggest reason" for excusing Mr. V. was that he had indicated on his questionnaire that he "has a religion for which he cannot

[4] One of the four jurors appellant references was Juror 34. Juror 34's voir dire questionnaire indicates "none" in the section for children. During voir dire, however, he stated that he had a son who was a deputy sheriff.

make a decision." During voir dire, the court asked Mr. V. about having noted on his questionnaire that he had "a belief that could prevent [him] from determining if somebody was guilty or not guilty of a crime." Mr. V. said that because of his religion he should not be judging anyone. The court asked whether he would be able to set this aside, listen to the evidence with an open mind and make a decision, and Mr. V. answered affirmatively. The prosecutor acknowledged this, but said, "However, clearly we wouldn't want him getting back into the jury room and not being able to deliberate."

Again, appellant attempts to undermine the credibility of the prosecutor's stated reason by pointing out that another juror also answered affirmatively where the questionnaire asked if he had a belief that could prevent him from determining whether someone was guilty of a crime, but was accepted by the prosecutor on the jury panel. Juror 34, like Mr. V., when questioned by the court, said he would be able to reach a decision. Appellant implies that of the two, Mr. V. should not have been the one removed on the basis of this question because Juror 34 "claimed he made a mistake in checking that box as he was in a hurry and did not bother to answer the questions carefully – hardly the qualities one would expect the prosecution to be looking for in a juror." The prosecutor did not have to draw the inference appellant suggests from Juror 34's explanation of his mistake; she could have taken it at face value. Juror 34, who stated that his son was a deputy sheriff and that he knew "a lot" of people who were highway patrol officers, deputy sheriffs and investigators for the federal government, may simply have been a juror the prosecutor expected to be favorable for her side of the case.

Finally, the prosecutor explained that she excused Ms. D. because the juror was a teacher in an early childhood program, which indicated a "sociology type background, common liberal type background" which the prosecutor felt was not favorable to the prosecution. The prosecutor stated that this view of Ms. D. as having a liberal background was also based on her belief that the areas where Ms. D. had previously lived, San Francisco and Ventura County, were liberal areas. Appellant points out that

nothing in the record demonstrated Ms. D. in fact had liberal tendencies; the fact that her grandparents had been robbed at gunpoint in their grocery store would tend to minimize her sympathy for the defendant in a theft-related case; the case had nothing to do with children; and one of the jurors who remained on the panel had a significant other who was a director of education services.

As we have explained, the issue is not whether the prosecutor correctly inferred that Ms. D. had liberal beliefs that might favor the defense but whether the prosecutor's belief was sincere. Inferences such as the prosecutor drew from Ms. D.'s occupation are permissible. (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 507-508 [juror excused in case involving drive-by shooting because of employment as counselor in Oakland schools]; *People v. Landry* (1996) 49 Cal.App.4th 785, 789-791 [prosecution for possession of heroin for sale; juror excused because she was a teacher and on board of drug treatment program; different juror excused because of educational background in psychology or psychiatry had had trouble with teachers as jurors and work in youth agency]; *People v. Barber* (1988) 200 Cal.App.3d 378, 389-390 [prosecution for narcotics offenses; kindergarten teacher excused because prosecutor believed teachers tend to be " 'liberal' " and " 'less prosecution oriented' "].) That Juror 20 was kept on the jury despite having a significant other who was a "director of educational services" does not prove the prosecutor's reasoning invalid. It was not Juror 20 himself who was involved in education, and the prosecutor was not required to draw the same inference from a job as director of educational services, presumably an administrative position, as from that of an early childhood education teacher. Further, Juror 20 also had two nephews who were deputy sheriffs, which might have made him an attractive juror to the prosecutor. In short, appellant's comparative analysis does not demonstrate that the prosecutor's explanations for her peremptory challenges were pretextual.

As we have said, the trial court who personally witnessed the voir dire is in a better position to evaluate the credibility of the prosecutor's explanations for peremptory challenges than an appellate court reviewing a cold record. (*Lenix, supra,* 44 Cal.4th at

pp. 626-627.) Neither the statistical argument nor the comparative analysis that appellant presents are sufficient to overcome the trial court's determination that the prosecutor did not act with discriminatory intent.

The judgment is affirmed.

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Kline, P.J.

We concur:

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Lambden, J.

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Richman, J.